No. 94-1711

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

HELENE A. STEIGMAN and MARY D. ERWIN, as personal representative of the Estate of Elizabeth D. Droze,

Petitioners,

v.

DORIS DANESE, FLORIDA NATIONAL BANK, as co-personal representative of the Estate of Bernard L. Danese, ESTHER BAKER, as co-personal representative of the Estate of Bernard L. Danese, and BARBARA DANESE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT OF PARENT CORPORATIONS AND SUBSIDIARIES

The following information is provided pursuant to Rule 29.1 of the Rules of this Court:

The interest of Florida National Bank, as co-personal representative of the Estate of Bernard L. Danese, has been succeeded to by First Union National Bank of Florida, N.A.

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REASONS FOR DENYING THE WRIT

Respondents, DORIS DANESE, FLORIDA NATIONAL BANK, as co-personal representative of the Estate of Bernard L. Danese, ESTHER BAKER, as co-personal representative of the Estate of Bernard L. Danese, and BARBARA DANESE, respectfully submit that the Petition for Writ of Certiorari (hereinafter referred to as the "Petition"), which seeks review of the decision of the First District Court of Appeal of Florida in *In re Estate of Danese*, 641 So. 2d 423 (Fla. Dist. Ct. App. 1994), should be denied.

I. THIS CASE DOES NOT PRESENT THE "SPECIAL AND IMPORTANT REASONS" REQUIRED TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT.

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). According to Petitioners, the opinion of the Florida Court of Appeal in *In re Estate of Danese* ignores, misinterprets, and misapplies controlling authority of this Court, including its decisions in *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Petitioners predict that the Florida Court of Appeal's opinion will "contaminate the entire body of case law concerning statutory property right deprivation," and contribute to the erosion of "the fundamental due process protections declared in *Coe* and its progeny." Petition, at 14-15, 17.

Petitioners fail to demonstrate any basis for this Court's exercise of its certiorari review. This Court may review

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). The Rules of this Court emphasize, however, that

> review on writ of certiorari is not a matter of right, but of judicial discretion. . . . [and] will be granted only where there are special and important reasons therefor.

Sup. Ct. R. 10.1. Such "special and important reasons" include state court decisions on "important question[s] of federal law" that have not yet been settled or that conflict with the relevant and established law of this Court. Sup. Ct. R. 10.1(c).

Contrary to the Petitioners' assertions, the opinion of the Florida Court of Appeal in *Danese* did not decide an "important question of federal law." *See* Sup. Ct. R. 10.1(c). Rather, the *Danese* opinion simply considered whether the Probate Court properly applied the decision of the Florida Court of Appeal in *Thames v. Jackson*, 598

So. 2d 121 (Fla. Dist. Ct. App. 1992),[1] to the facts of this case. The *Danese* court followed established Florida precedent to find that "the probate court erred in interpreting *Thames* to permit reopening of the estate and in denying appellants' motion for entry of order pursuant to mandate." 641 So. 2d at 426.

Moreover, even if, as Petitioners suggest, the *Danese* decision implicated fundamental constitutional principles of due process, the decision of the Florida Court of Appeal in no way contradicts controlling authority of this Court. *See* Sup. Ct. R. 10.1(c). Although Petitioners argue that the *Danese* opinion "fails to acknowledge the existence" of certain binding authority (including the Court's decisions in *Coe v. Armour Fertilizer Works* and *Wuchter v. Pizzutti*), this Court's opinions in *Coe* and *Wuchter* are neither relevant nor binding. Instead, the *Danese* court properly interpreted and applied the principles set forth in this Court's decisions in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), and *Mullane v. Central*

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[1] The rule followed by the Florida Court of Appeals in *Thames* is not new. *Thames* is merely one of many decisions that interprets the effect of the United States Supreme Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), upon probate non-claim statutes. *See, e.g., In re Estate of Kopely (Fahoum v. Winters)*, 159 Ariz. 391, 767 P.2d 1181 (Ct. App. 1988); *Jones v. Sun Bank/Miami, N.A.*, 609 So. 2d 98 (Fla. Dist. Ct. App. 1992); *In re Estate of Hill*, 582 So. 2d 701 (Fla. Dist. Ct. App. 1991); *In re Estate of Vickery*, 564 So. 2d 555 (Fla. Dist. Ct. App. 1990); *In re Estate of Barnett*, 549 So. 2d 1166 (Fla. Dist. Ct. App. 1989); *Public Health Trust of Dade County v. Estate of Jara*, 526 So. 2d 745 (Fla. Dist. Ct. App. 1988); *In re Estate of Sutherland*, 229 Ill. App. 3d 281, 593 N.E.2d 955 (1992); *In re Estate of Thompson*, 484 N.W. 2d 258 (Minn. Ct. App. 1992).

Hanover Bank & Trust Co., 339 U.S. 306 (1950), along with relevant authority of the Florida appellate courts.

II. THE OPINION OF THE FLORIDA COURT OF APPEAL IN *DANESE* DOES NOT PRESENT AN "IMPORTANT QUESTION OF FEDERAL LAW."

In *Danese* the Florida Court of Appeal did not find, as Petitioners suggest, that the Petitioners' actual knowledge of the opening of the Estate "cure[d] the fatal due process defect resulting from the failure of Section 733.702 (1983) to require the giving of actual notice to known or reasonably ascertainable creditors." Petition, at 11. The question of the constitutionality of the applicable probate non-claim statute – and the effect of a claimant's actual knowledge of information necessary to file a probate claim – had already been decided by the Florida Court of Appeal in *Thames v. Jackson*, 598 So. 2d 121 (Fla. Dist. Ct. App. 1992). *See also In re Rules of Probate and Guardianship Procedure*, 537 So.2d 500, 549-50 (Fla. 1988) (enacting Florida Probate Rule 5.495); *In re Estate of Barnett*, 549 So. 2d 1166, 1167-68 (Fla. Dist. Ct. App. 1989). The only question decided by the *Danese* court, then, was whether the Probate Court properly applied the decision of the Florida Court of Appeal in *Thames v. Jackson* "as its sole predicate for revoking the orders of discharge of the

personal representative" and allowing Petitioners to reopen the estate. 641 So. 2d 423, 424.[2]

In *Thames* a creditor who claimed to have been a "known or readily ascertainable" creditor of the estate filed an untimely claim. The creditor alleged that he had not received notice of the administration of the estate, and, in accordance with Florida Probate Rule 5.495, sought an extension of time within which to file his claim. The probate court struck the creditor's claim as untimely, and denied his petition for an extension of time. 598 So. 2d at 122.

The *Thames* court ruled that, based upon the rationale of this Court in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the 1985 version of section 733.702, Florida Statutes, violated due process and could not, standing alone, bar the claim of a known or reasonably ascertainable creditor. 598 So. 2d at 125. Because Rule 5.495 of the Florida Probate Rules[3] required a

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[2] In granting the petition to reopen, the Probate Court explained that

> even if the filing of a lawsuit is not a sufficient presentment of a claim under the non-claim statute [based upon the decision of the Florida Supreme Court in *Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991)], the failure to file a timely claim will not prevent assertion of that claim where an unconstitutional non-claim statute is relied upon as the only authority for barring the claim. *Thames*, 598 So. 2d at 125.

Appendix to Petition for Writ of Certiorari, at 31a.

[3] Following the *Pope* decision, the Supreme Court of Florida enacted Florida Probate Rule 5.495, which allowed known

creditor to establish that he lacked **actual knowledge** of the administration of the estate, the *Thames* court remanded for an evidentiary hearing on the factual issues presented, including a determination as to whether "the appellant did have knowledge of the opening of administration." *Id.* at 124, 125.

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creditors to petition for an extension of time within which to file a claim. According to Rule 5.495:

> If a creditor of the estate files a petition to extend the time for filing a claim, after the time allowed by law for presenting claims, or a petition to require payment of claim, which claim was filed after the time allowed by law for presenting claims, and the petition alleges that the creditor was known to or reasonably ascertainable by the personal representative, but was not served with a copy of the notice of administration, such petition shall specifically allege facts showing that such creditor was known to or reasonably ascertainable by the personal representative. **It shall also include a verified statement alleging either that i) the creditor did not have actual knowledge of those matters relating to creditors' claims required to be set forth in the notice of administration during the period allowed for filing claims against the estate, or (ii) facts sufficient to obtain relief under Florida Rule of Civil Procedure 1.540(b).**

Fla. Prob. R. 5.495 (emphasis added). The amended rule became effective in January, 1989, and, together with the 1985 version of section 733.702, operated as the procedural and substantive non-claim provision of the Florida Probate Code until October 1, 1991, when the Florida Legislature amended section 733.702 to allow creditors to petition for an extension of time.

Contrary to the Petitioners' assertions, then, the *Danese* court did not find that the Petitioners' actual knowledge of the opening of the estate "cure[d] the fatal due process defect resulting from the failure of Section 733.702 (1983) to require the giving of actual notice to known or reasonably ascertainable creditors." Petition, at 11. The Florida Court of Appeal did not even decide whether the Petitioners were in fact "known or reasonably ascertainable creditors," but simply held that

> the probate court erred in interpreting *Thames* to permit reopening of the estate and in denying appellants' motion for entry of order pursuant to mandate. Even if appellees were known or reasonably ascertainable claimants, appellees' failure to file a claim in the probate estate at any time before the estate was closed when they had actual knowledge of the opening of the estate makes *Thames* inapplicable to the present case.

Danese, 641 So. 2d at 426. Accordingly, the *Danese* court reversed the Probate Court's decision, and upon remand, instructed the Probate Court

> to apply the decision of the Florida Supreme Court in *Spohr v. Berryman*, 589 So. 2d 225 (Fla. 1991) and deny appellees' petition to reopen the estate, based upon their failure to file a timely claim in the estate.

Id. at 427.

Despite Petitioners' efforts to demonstrate otherwise, this case does not present an important federal question for the Court's discretionary review. The *Danese* court merely interpreted the relevant facts, in light of existing state case law, to find that the Probate Court erred in

relying upon *Thames* to reopen the estate. The limited applicability of the *Danese* opinion – and its emphasis upon the particular facts of the case – gives little credence to Petitioner's assertion that "the Florida Court of Appeal's opinion threatens to contaminate the entire body of case law concerning statutory property right deprivation." *See* Petition, at 14.

III. THE FLORIDA COURT OF APPEAL'S RULING IN *DANESE* IN NO WAY CONFLICTS WITH THIS COURT'S OPINIONS IN *COE* AND *WUCHTER*.

Petitioners also argue that the opinion of the Florida Court of Appeal ignores controlling and binding Supreme Court precedent, specifically, this Court's decisions in *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), and *Wuchter v. Pizzutti*, 276 U.S. 13 (1928). Petitioners' repeated efforts to demonstrate the applicability of *Coe* and its progeny have been correctly rejected by the Florida appellate courts, including the Florida Court of Appeal (which did not expressly address the *Coe* argument in its opinion and denied Petitioners' Motion for Rehearing Or, In the Alternative, Certification) and the Florida Supreme Court (which refused to exercise its discretionary jurisdiction to consider the case). Once again, Petitioners fail to demonstrate that the decisions of this Court in *Coe* and *Wuchter* control the question before the Florida Court of Appeal in *Danese*.

Not only do the facts of *Coe* and *Wuchter* differ from the facts of this case, the Petitioners' actual knowledge of information necessary to file a claim with the estate – in accordance with the rules of practice established by this

Court in *United States v. Raines*, 362 U.S. 17 (1960) – effectively deprived the Petitioners of standing to contest the constitutionality of section 733.702, Florida Statutes. The *Danese* court property rejected Petitioners' reliance upon *Coe* and *Wuchter* in favor of more relevant and apposite authority.

A. The facts of the *Coe* and *Wuchter* opinions are easily distinguishable from the facts of *Danese*.

Petitioners' reliance upon *Coe* and *Wuchter* ignores essential factual distinctions between this case and the two Supreme Court decisions. Neither *Coe* nor *Wuchter* addressed the constitutionality of probate non-claim statutes; more importantly, the statutes considered in each case were explicitly unconstitutional, and could not be constitutionally applied under any circumstances.

For example, the *Coe* decision considered the constitutionality of a statute that did not provide for notice or hearing in *any* form. *See Coe*, 237 U.S. at 417. The statute gave creditors the right, upon the return of an unsatisfied execution initially issued *only* for the property of the corporation, to issue an execution against shareholders for any unpaid stock subscriptions. The Court found the statute "repugnant to the 'due process of law' provision of the 14th Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation." 237 U.S. at 422-23. In emphasizing that the statute itself must provide notice and an opportunity for hearing, the Court stated:

> Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires.

237 U.S. at 424.

Similarly, in *Wuchter* the Court construed "the validity, under the 14th Amendment, of a statute of New Jersey providing for service of process on nonresidents of the state in suits for injury by the negligent operation of automobiles on its highways." 276 U.S. at 15. The defendant in *Wuchter* had actual notice of the pending action against him, but did not appear to defend the action. *Id.* at 24. The Court relied upon *Coe* to find that, because the statute itself did not require notice, the defendant's actual notice "[could] not, therefore, supply constitutional validity to the statute or service under it." *Id.*

The *Coe* and *Wuchter* decisions "involved challenges to statutory schemes which were constitutionally inadequate in all of their respective reaches." *Katz v. Ke Nam Kim*, 379 F. Supp. 65, 67 (D. Hawaii 1974). Yet unlike the facts of *Coe* and *Wuchter*, the statute at issue in *Danese* (to the extent the opinion even could be considered a "challenge" to the statutory scheme of section 733.702) has never been declared unconstitutional on its face. Rather, it is well established that the 1985 version of section 733.702, Florida Statutes, violates due process only when the statute, standing alone, bars the claim of a known or reasonably ascertainable creditor. *See Danese*, 641 So. 2d at 427; *Thames*, 598 So. 2d at 124-25. The *Danese* court did not even find it necessary to decide whether the Petitioners were known or reasonably ascertainable creditors.

Moreover, it is undisputed that the personal representative in *Danese* gave timely publication notice of the administration of the estate, and that the personal representative, through its counsel, gave actual, detailed notice of the administration of the estate to Petitioners. *See Danese*, 641 So. 2d at 424, 426. Unlike the Supreme Court's decisions in *Coe* and *Wuchter*, *Danese* determines only whether the particular *method* of actual notice given to Petitioners is reasonable under the circumstances, not whether the statutory notice by publication itself violates due process. *Id.* at 426. Indeed, in this fact-dependent decision, the sufficiency of notice by publication was not even implicated. *See id.* at 426-27.

Nor do the numerous state and federal courts cited by Petitioners demonstrate the applicability of *Coe* and *Wuchter* to the facts of this case. Petitioners argue that

> numerous state courts recognize the principle established by Coe and its progeny that application of a statute which does not provide for constitutionally sufficient notice is not rendered constitutional simply because one learns of the proceedings in some other way.

Petition, at 13. None of the cited state court opinions has any relevance to the facts of the case before the Florida Court of Appeal in *Danese*. With the exception of the Texas Court of Appeal's opinion in *Morris v. Morris*, 759 S.W.2d 707 (Tex. App. 1988), each of the state courts considered the constitutionality of statutes that did not require notice in *any* form before depriving the subject individual of his property. *See Pulaski County v. Commercial Nat'l Bank*, 194 S.W.2d 883, 888 (Ark. 1946); *Watkins v. Dodson*, 159 Neb. 745, 68 N.W.2d 508, 513 (1955); *Farnow v.*

Department 1 of Eighth Judicial Dist. Court in and for Clark County, 64 Nev. 109, 178 P.2d 371, 376 (1947); *Merco Construction Engineers, Inc. v. Los Angeles Unified School District of Los Angeles County*, 274 Cal. App. 2d 154, 79 Cal. Rptr. 23, 30 (1969); *Cugat v. Cugat*, 228 P.2d 31, 32 (Cal. Dist. Ct. App. 1951). And the *Morris* court relied upon "*Coe* and its progeny" to consider only two issues: first, whether an appellee committed extrinsic fraud when she "caus[ed] a citation by publication to issue when personal service was appropriate"; and second, whether the appellant was required to establish a meritorious defense.[4] 759 S.W.2d at 708.

Petitioners also contend that numerous federal district courts and courts of appeal cite *Coe* and *Wuchter* "as authority for the principal [sic] that actual knowledge cannot cure the failure of a statute to require constitutionally sufficient notice." Petition, at 12. Again, Petitioners fail to demonstrate the relevance of such opinions to the facts of this case. None of the cases cited considered the constitutional due process requirements of probate non-claim statutes. *See Sterling v. Environmental*

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[4] In support of the second issue, the *Morris* court cited another United States Supreme Court decision, *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), in which the Court stated that

> [when] a person has been deprived of property in a manner contrary to the most basic tenants [sic] of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 35 S. Ct. 625, 629, 59 L. Ed. 1027 (1915).

759 S.W.2d at 710.

Control Board of the City of New York, 793 F.2d 52, 53 (2d Cir.), *reh'g denied*, 795 F.2d 8 (2d Cir. 1986), *cert. denied*, 479 U.S. 987 (1986); *Rose v. K.K. Masutoku Toy Factory Co.*, 597 F.2d 215, 218 (10th Cir. 1979); *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 580 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962); *Baker v. Latham Sparrowbush Assoc.*, 808 F. Supp. 981, 987-88 (S.D.N.Y. 1992); *North Carolina Electric Membership Corp. v. White*, 722 F. Supp. 1314, 1316 (D.S.C. 1989); *Michelson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 709 F. Supp. 1279, 1282 (S.D.N.Y. 1989); *Fry's Food Stores of Arizona, Inc. v. CBM of Arizona, Inc.*, 636 F. Supp. 168, 171-72 (D. Ariz. 1986); *Leab v. Streit*, 584 F. Supp. 748, 758-60 (S.D.N.Y. 1984); *Katz v. Ke Nam Kim*, 379 F. Supp. 65, 67-69 (D. Haw. 1974). Indeed, three of the federal decisions cited by Petitioners simply held that even a defendant's actual notice of the pending civil action filed against him does not remedy otherwise defective service of process. *See Goldlawr*, 288 F.2d at 582; *Michelson*, 709 F. Supp. at 1282; *Leab*, 584 F. Supp. at 760. Several of the other federal decisions – like *Coe* and *Wuchter* – considered statutes which were unconstitutional as a matter of law. *See Rose*, 597 F.2d at 219; *North Carolina Electric Membership Corp.*, 722 F. Supp. at 1316-19; *Fry's Food Stores of Arizona*, 636 F. Supp. at 171-72. Finally, the Hawaii federal district court's opinion in *Katz* distinguished *Coe* and *Wuchter* to find that the appellant lacked standing to challenge the constitutionality of the state statute. 379 F. Supp. 65, 67-69.

Neither *Coe* nor its "progeny," then, controls the decision of the Florida Court of Appeal in *Danese*. The *Danese* court properly relied upon more apposite case law, finding that

> the Florida Supreme Court, in enacting Rule 5.495, and this court in *Thames*, implicitly recognized that actual knowledge of the information necessary to file a claim satisfies due process requirements.

641 So.2d at 427.

B. In accordance with the rules of practice established by this Court in *United States v. Raines*, the Petitioners lacked standing even to assert that section 733.702, Florida Statutes, violated constitutional due process principles.

Petitioners assert that *Coe* and *Wuchter* remain binding precedent, arguing that "this Court has never explicitly overruled, retreated from, or even questioned the relevant portions of these holdings." Petition, at 12. Contrary to Petitioners' argument, the rules of practice established by this Court in *United States v. Raines*, 362 U.S. 17 (1960), demonstrate that Petitioners – by virtue of their actual knowledge of the opening of the estate – lacked standing even to complain that section 733.702 was unconstitutional.

In *Raines* the Court emphasized the limited jurisdiction of federal courts:

> This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies.*

362 U.S. at 20 (emphasis added). Accordingly, to effectuate this limited jurisdiction, the Court relied upon certain

rules of practice, including the rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* at 21 (citations omitted).

Courts have relied upon the rule of restraint pronounced by the Court in *Raines* to limit the application of *Coe*. *See Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976); *see also Bowlin v. Deschutes County*, 712 F. Supp. 803, 807 (D. Or. 1988), *aff'd*, 918 F.2d 181 (9th Cir. 1990). In *Wiren* the Ninth Circuit relied upon *Raines* to refuse to allow a plaintiff, who had received *actual* notice of the seizure of his automobile, to challenge the constitutionality of the post-seizure notice provisions; the plaintiff, "[h]aving received such notice, . . . clearly . . . [was] accorded due process in the application of the statute as to him personally." 542 F.2d at 762; *see also Bowlin*, 712 F. Supp. at 807-808 (because plaintiff had received actual notice and a hearing, court did not find ordinance unconstitutional based upon asserted procedural due process defects).

Petitioners contend that the *Wiren* and *Bowlin* courts misinterpreted the rules of practice established in *Raines*. According to Petitioners,

> [T]he *Coe* court clearly was cognizant of the general rule that one may not assert that a statute is unconstitutional as applied to someone else when the Court rejected the argument that the plaintiff was not "within the class who may justly complain" because he had actual knowledge of the pending property deprivation.

Petition, at 15 n.5. Again, *Coe* and *Wuchter* are easily distinguishable, for "each involved challenges to statutory schemes which were constitutionally inadequate in all of their respective reaches." *Katz v. Ke Nam Kim*, 379 F. Supp. 65, 67 (D. Hawaii 1974). When faced with a statutory scheme that is constitutional as applied to certain individuals, federal courts have found that the receipt of actual notice may deprive the claimant of standing to argue that the statute violates constitutional due process principles. *See Katz*, 379 F. Supp. at 67-69 (considering statute that was constitutional when used as postjudgment collection remedy); *see also Wiren*, 542 F.2d at 761-62 (claimant not entitled to pre-seizure notice and opportunity for hearing under forfeiture statute); *In re Estate of Sutherland*, 229 Ill. App. 3d 281, 593 N.E.2d at 960-61 (1992) (considering constitutionality of probate non-claim statute following *Pope*).

Based upon the rules of practice stated by this Court in *Raines*, even if section 733.702, Florida Statutes, did not explicitly provide the means for giving sufficient actual notice to known creditors, Petitioners, having received actual notice, **may** not challenge the statute as unconstitutional. *See Wiren*, 542 F.2d at 762; *accord In re Estate of Sutherland*, 229 Ill. App. 3d 281, 593 N.E.2d at 960-61 ("[e]ven if the publication notice provisions of . . . the Probate Act were constitutionally deficient as to a creditor without notice of the probate proceeding, . . . [the creditor's] receipt of actual notice 'deprives him of standing to raise the claim' ") (citing *Wiren*, 542 F.2d at 762). Actual notice of the pendency of the probate proceeding, therefore, *is* relevant, for the receipt of such notice

deprived Petitioners of any standing to assert the alleged unconstitutionality of section 733.702.

IV. THE FLORIDA COURT OF APPEAL DID NOT MISINTERPRET OR MISAPPLY THE COURT'S OPINIONS IN *POPE* OR *MULLANE* IN FINDING THAT PETITIONERS' ACTUAL KNOWLEDGE OF THE OPENING OF THE ESTATE SATISFIES DUE PROCESS REQUIREMENTS.

Finally, Petitioners contend that the *Danese* court "misinterpreted and misapplied this Court's opinions" in *Pope* and *Mullane*. Petition, at 16. According to the Petitioners,

> [T]he Florida Court of Appeal cited *Mullane* and *Pope* as authority for the proposition that due process requirements can be satisfied by actual knowledge. In so holding, the court failed to recognize that both *Mullane* and *Pope* deal exclusively with the question of what sort of notice is required to be given by the terms of a statute.

Not only does Petitioners' interpretation contradict the express language of the *Danese* opinion, the *Pope* and *Mullane* opinions considered general constitutional due process requirements, and should not be limited simply to determining "the question of what sort of notice is required to be given by the terms of a statute." Petition, at 16. Once again, despite Petitioners' predictions of the "detrimental effect that . . . [the *Danese*] opinion will have on Fourteenth Amendment due process jurisprudence," Petitioners fail to demonstrate any compelling reason for this Court to exercise its discretionary jurisdiction.

First, the Petitioners' interpretation of *Danese* contradicts the very language of the court's decision. Although Petitioners argue that the *Danese* court cited *Mullane* and *Pope* "as authority for the proposition that due process requirements can be satisfied by actual knowledge," the Florida Court of Appeal actually relied upon controlling authority of the Florida appellate courts in reaching this conclusion. As the *Danese* court explained,

> [T]he Florida Supreme Court, in enacting Rule 5.495, and this court in *Thames*, implicitly recognized that actual knowledge of the information necessary to timely file a claim satisfies due process requirements. It is undisputed that appellees in the instant case had actual knowledge of the opening of the estate. Appellees, in fact, sued the estate, naming and serving the appropriate personal representative, within the three-month non-claim period prescribed by section 733.702, Florida Statutes. We, therefore, hold that the probate court erred in relying on *Thames* in denying appellants' motion for entry of order pursuant to mandate and in granting appellees' petition to reopen the estate.

641 So. 2d at 427.

The *Danese* court even distinguished the facts of this case from the facts of *Pope*. The *Danese* court "[was] not persuaded that the *Pope* court would have been sympathetic to appellees," for despite their undisputed actual knowledge of the opening of the estate, Petitioners "did not file a claim in the estate," but instead "filed and served a civil complaint naming the estate within the three-month non-claim period." 641 So. 2d at 426. Moreover, Petitioners "argued the applicability of *Thames* only

after appellants filed a motion to enforce . . . [the] mandate in *In re Estate of Danese*, 601 So. 2d 570 (Fla. 1st DCA 1992)." 641 So. 2d at 426 (citing *In re Estate of Gleason*, 631 So. 2d 321 (Fla. Dist. Ct. App.), *review denied*, 640 So. 2d 1105 (Fla. 1994), *cert. denied*, 115 S. Ct. 726 (1995)).[5] As the *Danese* court correctly noted, Petitioners' failure to file a timely probate claim resulted not from any deficiencies in the notice, but from the Petitioners' own failure to act properly on the notice received. *See* 641 So. 2d at 426 (citing *Gleason*).

And nowhere in the *Pope* and *Mullane* decisions did the Court restrict its interpretations of constitutional due process requirements to cases that "deal exclusively with the question of what sort of notice is required to be given

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[5] In *Gleason* the claimant argued that "his failure to file a claim against the estate . . . [was] no bar because he was not given actual notice of the time in which to file claims and was thus deprived of due process" under *Pope*. 631 So. 2d at 322. The *Gleason* court rejected the claimant's argument, emphasizing that the *Pope* court would not have been sympathetic to this claimant:

> First, the *Pope* court was not being asked to reopen an estate which had been closed for 14 months. Second the *Pope* claimant was a creditor who had no notice of the death and was merely seeking to file beyond a two month non-claim period, while this claimant was litigating against Gleason at the time of Gleason's death, was represented by counsel who knew the estate was being probated in Florida, and took no action until 14 months after the estate was closed.

631 So. 2d at 323. Accordingly, the *Gleason* court concluded that "it was not the expiration of Florida's three month non-claim period which bars this claim, **but rather claimant's failure to do anything in the Florida estate until 14 months after it was closed.**" *Id.* (emphasis added).

by the terms of statute." Petition, at 16. Instead, *Pope* and *Mullane* considered broader issues relating to constitutional due process requirements. As the *Pope* Court explained:

> Mullane v. Central Hanover Bank & Trust Co. . . . established that state action affecting property must generally be accompanied by notification of that action: "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.". . . . The focus is on the reasonableness of the balance, and, as Mullane itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.

485 U.S. at 484 (citations omitted). The *Danese* court – in accordance with the decision of the Fourth District Court of Appeal of Florida in *In re Estate of Gleason* – simply cited *Mullane* for the proposition that "whether a particular method of notice is reasonable depends on the particular circumstances," and noted that the *Pope* court would not have been sympathetic to the Petitioners in the present case. 641 So. 2d at 426 (citing *In re Estate of Gleason*, 631 So. 2d at 323).

Because the *Danese* court correctly interpreted and applied the principles of *Mullane* and *Pope* in accordance with the particular facts and circumstances of this case, the *Danese* opinion necessarily does not have any "detrimental effect . . . on Fourteenth Amendment due process jurisprudence." Petition, at 17. Once again, Petitioners

fail to demonstrate any compelling reason for this Court to exercise its discretionary jurisdiction.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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